85-1536

No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS R. ANGEL and LORETTA C. ANGEL

Petitioners,

vs.

SUPERIOR COURT OF SAN DIEGO COUNTY,
DON MARTINSON, JUDGE

Respondent,

Louis H. Renn

Real Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CALIFORNIA

This Petition is taken pursuant to Section 1257(3) of Title 28 of the United States Code.

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QUESTIONS PRESENTED

The courts disregard for its prior determination on the issue of probable cause involving defendants belief in their cause violates due process and equal protection under the law.

The courts merging of 2 independent elements (favorable termination of a lawsuit and probable cause) in an action for malicious prosecution violates due process and equal protection under the law.

The courts denial of defendants jury instruction on probable cause involving both the reasonable mans belief and the individuals belief, while substituting a jury instruction (founded nowhere in law) making the objective and subjective standard an either/or finding necessary to establish lack of probable cause precluded due process and equal protection under the law.

The courts intentional and continued violation of the pre-trial stipulation involving material admissible evidence precluded due process and equal protection under the law.

The courts denial of all jury instructions material to defendants first affirmative defense violates due

process and equal protection under the law.

The courts denial of defendants right to material rebuttal questioning of witnesses, each one, constitutes an extreme violation of due process and equal protection under the law.

The courts denial of defendants right to ask any question regarding motives, understanding and content as to written documents admitted into evidence violates due process and equal protection under the law.

The courts allowance of an award of damages in the amount of $50,000. pursuant to the cause for intentional infliction of emotional distress despite plaintiffs admission of suffering no emotional distress violates due process and equal protection under the law.

The courts allowance as only evidence of actual damage those checks which plaintiff admits may not have been made pursuant to litigation sued upon herein violates due process and equal protection under the law.

All parties appear in the caption of the case in the United States Supreme Court.

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OPINIONS BELOW

Judgment on Verdict N 23298 was entered in Judgment Book 1557, page 216 on March 12, 1984 and is reproduced as APPENDIX "E" to this petition.

The order denying motions for judgment notwithstanding verdict and new trial is reproduced as APPENDIX "D" to this petition.

Petitioners appeal thereto, 4 Civ. No. D001813, was denied by the Court of Appeal on October 15, 1985. The Court of Appeals denial is reproduced as APPENDIX "C" to this petition. Petitioners' petition for a rehearing by the Court of Appeal was denied November 6, 1985, and is reproduced as APPENDIX "B" to this petition.

Petitioners' petition for review by the California Supreme Court was denied December 30, 1985, and is reproduced as APPENDIX "A" to this petition.

JURISDICTION

The ruling of the Supreme Court of the State of California was entered December 30, 1985. This Court has Jurisdiction under United States Code, Title 28, Section 1257(3).

STATUTORY and CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment of the Constitution of the United States, Section 1 in relevant part provides:

"No state shall deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

The doctrine of stare decisis in relevant part provides:

"All tribunal exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction."

California Code of Civil Procedure Section 1911 in relevant part provides:

"That only is deemed to have been adjuidged in a former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

California Code of Civil Procedure Section 647 in relevant part provides:

"Refusing to give an instruction is deemed to have been excepted to."

California Code of Civil Procedure Section 657(7) in relevant part provides:

"A verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues on application of an aggrieved party for an error in law, occuring at the trial and excepted to by the party making the application, materially affecting the substantial rights of the applicant."

California Evidence Codes in relevant part provide:

Section 601(a) and (b), "A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof."
Section 622, "The facts recited in a written instrument are conclusively presumed to be true as between the parties.". . .
Section 604, "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption."
Sections 768-769, "A direct or cross examiner may question a witness concerning a writing without having to first show the writing to the witness, or to read or disclose any portion of the writing to the witness."
Section 780(g), (h) and (i), "The court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including, (g) A statement previously made by him that is inconsistent with his testimony at the hearing, (h) A statement made by him that is inconsistent with any part of his testimony at the hearing, (i) The existence or nonexistence of any fact testified to by him."
Section 765, "An examiner may not ask a witness a question that contains as assertion or assumption that a fact exists which has not been established by any evidence."
Section 403, (a) the proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: (1) the relevance of the proffered evidence depends on the existence of the preliminary fact."

STATEMENT OF THE CASE

1. Proceedings in the courts below - Plaintiff (hereinafter Renn) was awarded $154,331.13 plus costs via judgment on Verdict pursuant to his complaint for Malicious prosecution and intentional infliction of emotional distress.

Renn alleged such cause against defendants (hereinafter Angels) pursuant to Angels complaint (N14705) to set aside prior judgment (N8598) as rendered due to extrinsic fraud.

The original case (N8598) was appealed as 4 Civ. 31142, and in the United States Supreme Court as 84-246. The second case (N14705), subject of the case herein for malicious prosecution and intentional infliction of emotional distress, was appealed as 4 Civ. 24901, and in the United States Supreme Court as 82-1714.

Original Case N8598 was for specific performance of a contract to sell real property. Trial Judge Charles Froehlich ruled nonsuit on Angels first two causes, being breach of an oral contract and breach of a written contract.

Angels other causes for fraud, misrepresentation

and false promise were not heard as the result of a settlement being entered into the record while Angels were not present in court. Trial Judge Charles Froehlich made the terms of such settlement, and thereto directed a fraudulent record wherein it was stated Angels knew of such settlement.

After trial attorney Kevin Midlam (hereinafter Midlam) entered Angels into a settlement they knew nothing about, he told Angels he would then remove the waiver from their rights. Some time later however, Associate Counsel Sam Frazier (hereinafter Frazier) called Angels and informed them they should tell Midlam they just wanted to buy some time and Midlam would go ahead and remove the waiver. When Midlam called, Angels did as Frazier instructed, and Midlam said he wouldn't represent Angels at all. When Angels told this to Frazier, Frazier said he would represent Angels and do anything short of implicating Midlam in a malpractice suit in an effort to remove the waiver from Angels' rights. Frazier was to do the work and another attorney would make the court appearance. Angels met with the other attorney who didn't seem to know what his position

was to be. Frazier said he couldn't get a hearing to remove the waiver until several days after the time for filing a notice of appeal. The San Diego Lawyer Referral Service recommended attorney Mark Dodge (hereinafter Dodge), who said he would represent Angels, if Angels could obtain their file from Frazier. When Angels contacted Frazier, Frazier said he had an appointment that very day to see the judge, and would accompany Dodge and Angel to court. Dodge told Angels he would move to set aside the judgment, but could not mention anything about the unauthorized settlement. He was true to his word, which became more and more puzzling since opposition cousel and the court concentrated on a settlement being a settlement with, of course, no mention that the settlement was unauthorized which was known to both the court and the opposition cousel, and unknown, as to their knowledge, by Angels. Angels obtained other counsel, who promised an appeal that just never quite materialized. Since Angels were denied their application to produce additional evidence, being proof that the settlement was unauthorized, and the court of appeal limited the issues on appeal to the motion

brought by Dodge, Angels' appeal was limited to the issue of inadvertent mistake. Subsequently, Angels appealed N8598 as Judgment being rendered due to extrinsic Fraud, being 4 Civ. 31142 and U.S. 84-246, and addressed, for the first time, the issue of judgment N8598 being void for an excess of the courts jurisdiction.

Between the appeals in N8598, the subject case N14705 was filed to set aside judgment N8598 and such settlement therein contained as rendered due to extrinsic fraud, alleging that Angels' attorneys had sold-out their cause in N8598. Renn was granted Summary Judgment. Trial court judge Anthony Joseph took approximately 2 months in decision. Judgment N14705 was appealed as 4 Civ. 24901, and in the United States Supreme Court as 82-1714.

2. Presentation of Questions to Courts below - The courts disregard for its prior determination on the issue of probable cause, involving defendants belief in cause N14705, was presented to the courts below as follows:

In granting summary judgment N14705 to Renn, the trial court stated in its' memorandum of decision

thereto as follows:

> "It is easy to understand that Angels . . . may feel that the inferences suggested by them are so strong that they constitute fact." (Plaintiffs trial exhibit 47, page 5/4-7)

Pursuant to oral arguments at such motion for summary judgment, the record reads as follows:

> "The Court: Let me tell you what I intend to do. I'm going to take this matter under submission, and I am going to read through all of this material back to the part where I fell I need to in order to have a full understanding of the file. You are doing quite well, considering the fact that you are not a lawyer, but some of the things that may appear to represent a misrepresentation to you may not, in a legal context represent a misrepresentation."
> "The Court: I assure both sides that I will take the time necessary to understand whats gone on before. If the summary judgment is granted, the next level has to be an appellate review. I want to be careful in trying to understand it. It's a complicated file." (AA 105/9-19)[1]

Prior to Renn's motion for summary judgment in N14705, he had brought a motion for order requiring Angels to furnish Security alleging that Angels had filed complaint N14705 solely to harass and annoy, and thereto were vexatious litigants. The trial court denied such motion. Further, Renn's motion for summary judgment was coupled with the motion once a-

[1] Appellants' Appendix in lieu of clerk's transcript California Rules of Court 5.1 - Appellant's Appendix is referenced herein as AA

gain for order requiring Angels to furnish security.

However, in granting summary judgment, trial judge Anthony Joseph found Angels belief in case N14705 not just understandable, but easily understood", and instructed that if summary judgment were granted, "the next level has to be an appellate review." supra

Therefore, when coupling the trial judge's lengthy and careful consideration of the file in N14705 with his knowledge of the applicable law, such statements in memorandum of decision thereto is substantial. The trial judge did not preceive Angel's complaint as meritless in instructing that should summary judgment be granted, "the next level has to be appellate review."

Once judgment via a memorandum of decision is rendered by the court on a given issue, such judgment can not be set aside except as provided for in law in accordance with California Code of Civil Procedure §1911.

In accordance with Kahn v Pelissetti (1968) 260 Cal App 2d 832, 833, 67 Cal Rptr. 517 and Poochigian v Layne (1953) 120 Cal App 2d 757, 261 P2d 738, "The doctrine of res judicata is that an existing final judgment on the merits of a cause, without fraud or collusion, rendered by a court of competent jurisdiction, is conclusive of the rights of the parties

thereto and of their privies on all material issues which were tried and determined, and on all issues which might have been properly tendered therein, in all subsequent actions or suits in any tribunal of concurrent jurisdiction involving the same points directly or indirectly." In accordance with State Farm etc. Ins. Co. v Salazar (1957) 155 Cal App 2d Supp 861, 864, 318 P 2d 210, " A judgment entered after granting a motion for summary judgment is as final and conclusive a determination of the merits as a judgment after trial."

The courts merging of 2 independent elements (favorable termination of a lawsuit and probable cause) in an action for malicious prosecution was presented to the courts below as follows:

The only evidence entered as to the issue of lack of probable cause was the pleadings done by Angels and their attorneys and the various court denials thereto, not only as to case N14705, but as to case N8598 as well. Such exhibits were addressed nowhere as to merit and were entered for the sole purpose of demonstrating how many times the court had ruled against Angels.

In accordance with Kassan v Bledsoe (1967) 252 Cal App 2d 810, "existence of probable cause as defense to malicious prosecution action is not negated by merely showing that accused was successful at trial of proceedings in securing an exoneration, and not even a conflict on issue of probable cause is created by such result." In accordance with Northrup v Baker (1962) 202 Cal App 2d 347, "Proof of favorable termination of the criminal proceeding does not

create a conflict on issue of whether defendant had probable cause to make criminal complaint, and proof that no crime was committed or that plaintiff was innocent does not negative existence of probable cause."

Out of 58 exhibits requested by Renn for judicial notice and thereto admitted in evidence at trial, 56 such exhibits were legal pleadings and rulings thereto against Angels. Such exhibits were addressed nowhere by Renn, nor any witness for Renn, as to merit.

In accordance with Masterson v Pig' n Whistle Corp. (1958) 161 Cal App 2d 323, 335, 326 P 2d 918, "Fact that lawsuit was unsuccessful as not, standing alone, justifying inference that it was brought without probable cause."

That lawsuit N14705 was unsuccessful, standing alone, justifies not even an inference for lack of probable cause. Such law makes no exception for the degree to which a lawsuit is unsuccessful. How many motions, writs, or that an appeal was denied is irrelevant to and separate from the issue of probable cause. Favorable termination of a lawsuit is an issue independent of probable cause.

In view of the fact that such voluminous exhibits were permitted in evidence at trial, the courts refusal of Angels jury instruction applicable thereto

was compounded prejudice.

Such jury instruction was Albertson v Raboff (1960) 185 Cal App 2d 372, 385, "Probable cause does not mean "legal cause" because, if it did, then every plaintiff who failed to recover in his lawsuit would be liable to an action for malicious prosecution." (AA 367)

Exhibits 1 thru 17 were done both in part by Angels attorneys and upon informed advice of counsel. Under the pretense of establishing lack of probable cause by demonstrating over and over again how unsuccessful Angels had been in litigating at all, 30 such exhibits were legal pleadings and rulings as to the original case N8598, not case N14705.

Therefore, in a never-ending maze of circular legal shenanigans, Angels, in an effort to defend against lack of probable cause, were forced to defend against their lack of success in litigation of N8598 done both in part by Angels attorneys and upon informed, advice of cousel. The courts refusal of Angels jury instruction applicable thereto was BAJI 7.36 entitled "Probable cause for prosecution-advice of counsel," stated as follows:

> "If you find the defendant in good faith sought the advice of an attorney before initiating the prosecution of the civil proceeding against plaintiff and made a full, fair and complete disclosure to

> him of all the pertinent and material facts of which the defendant had knowledge tending to prove or disprove the civil allegations and thereafter the defendant acted upon the advice of the attorney and in the belief of plaintiff's civil liability for the alleged wrong, then you must find that there was probable cause in initiating the prosecution of the civil proceeding against plaintiff." (AA 353)

Lastly, Angels testimony stating that they filed N14705 for the reason stated therein and being because they believed their attorney had sold-out their cause in N8598 is nowhere contradicted, nor did Renn through testimony, exhibits, or questioning of any witness address such issue.

The courts denial of defendants jury instruction on probable cause involving both the reasonable mans belief and the individuals belief, while substituting a jury instruction (founded nowhere in law) making the objective and subjective standard an either/or finding necessary to establish lack of probable cause was presented to the courts below as follows:

The court refused Angels' jury instruction Popelka, Allard, McCowan and Jones v Superior Court of Santa Clara County (1980) 107 Cal App 3d 496 which states, "Probable cause standard in a malicious prosecution action is partly objective, a reasonable man's belief that the claim has merit, and partly subjective, defendant's belief that the claim had merit." (AA 372) In accordance with California Code of Civil Procedure §647, "refusing to give an instruction is deemed to have been excepted to."

Further, in regard to requested jury instructions which were refused by the court, the court stated as follows:

> "If I refuse to give your instructions as requested, you can always have that reviewed." (RT 601/28 and 602/1)

In accordance with Klotz v Alexander (1962) 203 Cal App 2d 238, 243, 21 Cal Rptr. 305, "a persons subjective good faith is an independent element of probable cause." In accordance with White v Brinkmar (1937) 23 Cal App 2d 307, 312, 73 P 2d 254, "The element of probable cause must be viewed from a subjective, as well as an objective point of view." The jury instruction given in place of the aforementioned instruction was not requested by Angels, nor was any authority given for such replacement. (AA 321)

Such instruction states, "Lack of probable cause may be shown in either of two ways: 1. That defendants did not have an actual good faith belief in the charges made in case N14705, or 2. That a reasonable person of ordinary prudence would not believe the truth of the charges made in case N14705."

Such instruction precluded a finding on defendant's belief, an essential element of probable cause. In accordance with California Code of Civil Procedure §657(7), Such verdict may be vacated. Such instruction presented to the jury frees the jury to find lack of probable cause without consideration of

Angels' belief in filing N14705. Reasonably, malice can be inferred as to lack of probable cause only when the parties belief in their cause is a finding within the issue of probable cause. In this regard, Angels were prejudiced further by the court given instruction entitled Malice inferred, stating,

"The existence of Malice on the part of the defendants may be inferred from a lack of probable cause in initiating the lawsuit against the plaintiff." (AA 324)

A parties belief in their cause is fundamental to and inherent in the issue of probable cause and thereto such element can not be discarded in any fashion and specifically not by an "either, or" instruction to the jury. Therefore, the courts refusal of Angels' instruction, which accurately reflected current law, and replacement thereto against law, not only worked to Angels detriment, but prevented a fair consideration and determination by the jury on such issue, in fact the controlling issue in a cause for malicious prosecution.

The courts intentional and continued violation of the pre-trial stipulation involving material admissible evidence was presented to the courts below as

follows: Prior to trial, and in judges chambers, defendant Loretta Angel stated the stipulation in accordance with what Angels were told by Renns' counsel, Philip Burkhardt as follows:

> "Mrs. Angel: You see, your honor, I made this list last night. I didn't go back through the documents to check all the exhibits. Basically my understanding of the stipulation that is we will both be free to offer in evidence any thing that is of record in the Angel versus Renn cases, all of them.
> The Court: And I agree with that, other than I'm simply saying, is you don't want it in there two, three, or four or fifty times, do you." (RT 55/4-11)

The court concurred with such stipulation and Renns' counsel made no objection thereto. In reliance upon such stipulation, Renn was permitted, without objection from Angels, to enter any documents of court record in cases N8598 and N14705.

However, when Angels attempted to have their first exhibit marked for identification pursuant to and in reliance upon such stipulation, the court refused to admit such evidence. The record reads as follows:

> "Mrs. Angel: We stipulated that everything of record in the prior lawsuits could come in as evidence. Mr. Burkhardt and I stipulated to that. This is of evidence in the prior two cases.
> Mr. Burkhardt: Objection, your honor, that was not the stipulation.
> The Court: Well - -
> Mrs. Angel: That was the stipulation."(RT 214/2-9)

Such record is incorrect in that it was the court, not Renn's counsel, who objected and stated that was not the stipulation. Further, Mrs. Angel requested at such time that the stipulation be read back by the court reporter. The court denied such request. However, the court reporter refused to make such corrections pursuant to Angels request for corrections of the reporters transcript subsequent to trial.

Some 72 pages later, and after the court repeatedly objected to and refused evidence admissible under such stipulation, the following record reads:

"Mr. Burkhardt: Objection, your honor, shouldn't be reading the document. It's not in evidence. It's not on her request for judicial notice. It's not properly admitted into evidence.
Mrs. Angel: Excuse me, it's in the record in N14705. You stipulated anything of that record can come in.
Mr. Burkhardt: For the third time, probably fourth time that was not the stipulation. It's not on her list --
Mrs. Angel: Could we, the court reporter read back the stipulation? He stipulated to that." (RT 281/13-22)

"The Court: My understanding of the stipulation was simply that you have given us a list. And the list was stipulated to on both his list and your list, with the exception of those items MM, NN, OO, PP, QQ & SS." (RT 281/25-28)
Mrs. Angel: Your Honor, could we, the court reporter read back the stipulation, that was not the stipulation.

The Court: Mrs. Angel that would take the court reporter probably 15 to 30 minutes to locate that." (RT 282/1-4)

A total of 8 exhibits were refused into evidence even though they were on the judicial noticed list submitted by Angels, and thereto conformed even to the courts stated interpretation of the pre-trial stipulation on admissible trial evidence. Of these eight exhibits, seven were legal documents filed in case N14705 and one was filed in the original case N8598. Such exhibits were defendants A, Y, X, V, W, J, K & T.

Therefore, after Renn had received every advantage pursuant to the pre-trial court approved stipulation on admissible evidence, the court violated such stipulation repeatedly against Angels. Defendants exhibits A, Y, X, V, W, J, K & T were absolutely vital to Angels defense.

Defendants Trial Exhibit X is the declaration of attorney Lynne M. Geyser involving her review, evaluation and expert opinion as to the original case N8598. Such opinion directly states that Angels had a winning case in N8598, that their attorney undermined such case, and that their attorneys' perfor-

mance at trial was suspect when parallel consideration is given to his experience in the legal community. Such exhibit was vital in proving Angels first affirmative defense, being that "Angels attorneys did in fact sell out case N8598" and was certainly material to Angels state of mind, and directly relevant to Angels jury instruction which was refused by the Court, being BAJI 7.36 supra entitled "Probable cause for prosecution -advice of counsel."

Defendants Trial Exhibit Y is Renns Motion for order requiring Angels to furnish Security filed in N14705 alleging that Angels had filed N14705 solely to harass and annoy, and thereto were vexatious litigants. Also included in such exhibit is the courts' order denying such motion. In view of the fact that Angels are being accused of malice herein, certainly the courts finding in N14705 that Angels were not vexatious litigants therein was material to a just determination. Further, since Renn's trial exhibits demonstrated over and over again how many times the court ruled in his favor, the one ruling in Angels favor constituted some necessary rebuttal evidence.

Defendants Trial Exhibit V is the declaration of attorney Peter J. Mueller who represented Angels originally in case N8598 and filed in N14705. In such declaration attorney Peter J. Mueller quotes from correspondence he had received from Angels on dates February 10, 1978 and February 21, 1978 wherein Angels state, "We want to put our connection with Renn behind us and not enlarge upon it in any way." Such evidence was material in establishing Angels state of mind and motives toward Renn.

Defendants Trial Exhibit W is the declaration of Angels filed in N14705, wherein Angels declare their inability to obtain valid legal representation against the wrongdoing by their attorneys in case N8598, and declare their efforts for remedy of the wrongdoing by their attorneys in case N8598 with the State Bar of California to no avail, and specifically included an Iowa Supreme Court case entitled State v Kaufmann (1926) 202 Iowa 157, 161 which states in relevant part as follows:

> "It is a matter of common knowledge that members of the legal profession are reluctant to complain of misconduct on the part of their brethern, even when it is known to exist." (AA 271/22-24)

Such declaration is material and essential to establishing Angels' state of mind and motives in N14705. Since BAJI 7.36, "Advice of Counsel", supra, is a complete defense to an action for malicious prosecution -how then can a person seeking advice of counsel and being unable to obtain counsel be liable? Angels spent many long hours calling many attorneys in an effort to obtain counsel. The responses were always, "I won't go against another attorney," No, I have to work in this community", and "You'll have to go out of the San Diego Area".

That the legal community knows of such rampant injustice and does nothing is appalling, that the legal community knows of such rampant injustice and further victimizes the victim is even more appalling.

Angels request that the United States Supreme Court take judicial Notice of what is occuring in the California legislature regarding the state bars demonstrated lack of ability to discipline attorneys, Senate Bill 1543, and the recent 6 part series of articles published March 25-29, 1985 in the San Francisco Examiner entitled the Brotherhood.

Defendants Trial Exhibit T is Angels' motion to

compel answers from their trial attorney in case N8598 via deposition and filed in N14705. Such motion is material and essential in establishing Angels motives, beliefs and purposes in N14705, and is equally material to Angels first affirmative defense in that their trial attorney's motives in N8598 become more suspect with his continued refusal to answer any questions as to his representation of Angels case at trial. Such motion is material and essential to Angels' second affirmative defense, which the court refused to read to the jury at trial herein, being "Defendants were not permitted to conclude discovery in case number N14705". (AA 9/7-9)

Defendants Trial Exhibit A is a statement, both written and signed by Renn dated March 2, 1977. On direct examination, Renn testified at trial herein that he never had an agreement to sell the property which was the subject of case N8598 to the Angels. (RT 180/6-8) Renn testified further at trial herein as follows:

> "I didn't feel I had ever agreed to anything. But the $1,300. They wanted to have some holes punched in the ground. I said it isn't necessary. If you succeed in buying the property, you're going to have to do that anyhow. But if you want to do it,

you do not get the property, I'll pay for the work that was done. If you do take the property,then that's part of your construction costs." (RT 184/7-13)

However, Defendants trial Exhibit A discredits such testimony entirely in that Renn therein is urging Angels not only to precede working on the subject property, but also advising Angels how best to precede, and Renn states in such exhibit as follows:

"This is the wisest course. Use of the Septic tank and seepage pit is the best system, by far. Since this system would be part of your whole building job, it seems fair for you to pay for it. If the county did not approve the pit, then I would pay for it." (AA 288/26-31)

After permitting Renn to testify fully to a particular situation, Angels were entitled to rebuttal cross-examination by way of documented evidence both written and signed by Renn. The courts ruling violated Evidence Codes §601(a) & (b), §622 and §604.

Defendants Trial Exhibit K was a lawsuit filed against Renns for fraud involving the sale of the property which was the subject property of N8598, and Defendants Trial Exhibit J was the corresponding lis pendens filed pursuant to such lawsuit for fraud, both filed by plaintiff Creighton.

Renn was permitted on direct-examination by his own

counsel to testify as follows:

> "And Mrs. Renn said, I've never before in my life been accused of a fraudulent act." (RT 181/21-22)

Defendants K was a lawsuit filed against Renns, and in particular against Mildred Morrow Renn for "fraud." Such evidence would certainly have impeached the prior testimony of Renn. Further, Renn testified that a lis pendens, other than Angels filing of the lis pendens, had never been filed against him. Again the court violated Evidence Codes §601(a) and (b), §622 and §604.

The courts denial of all jury instructions material to defendants first affirmative defense was presented to the court below as follows:

Angels' case N14705 and their first affirmative defense, being that Angels attorneys sold-out their cause in N8598, is based upon fraud and conspiracy practiced by attorneys. However, the court refused all jury instructions offered by Angels in this regard, being BAJI 12.36 entitled "Fraud-Deceit-nondisclosure of known facts", BAJi 12.31 entitled "Fraud and Deceit, Intentional misrepresentation", BAJI 12.32 entitled "Fraud and Deceit, expression of opinion", BAJI 12.35 entitled "Fraud and Deceit, concealment", BAJI 12.36 entitled "Fraud and Deceit, nondisclosure of known facts", BAJI 12.37 entitled "Fraud and Deceit, active concealment of

known facts," BAJI 12.50, entitled "Fraud and Deceit, person to whom representations made", BAJI 12.51 entitled "reliance" and BAJI 12.52 entitled "right to rely."

Court also refused jury instructions thereto as follows: Horn v Guaranty Chevrolet Motors (1969) 270 Cal App 2d 477, 483. "Intent is usually proved by inference from fact of concealment or from misrepresentation of material facts." Johnstone v Morris (1930) 210 Cal 580, 590, Beeman v Richardson (1921) 185 Cal 280, 282, and Revert v Hesse (1920) 184 Cal 295, 301, "Fraud and conspiracy are not generally practiced in the open light of day and for that reason are not ordinarily susceptible of direct proof but must be spelled out from circumstantial evidence. In cases of conspiracy to defraud it is not to be expected that direct evidence of the conspiracy can be secured, because such evidence could usually only be secured in the event one of the conspirators confessed. The jury may infer the conspiracy from all the circumstances."

Absent such instructions no valid determination herein could be rendered.

The courts denial of defendants right to material rebuttal questioning of witnesses, each one, and the courts denial of defendants right to ask any question regarding motives, understanding and content as to written documents admitted into evidence was presented to the courts below as follows:

Upon Angels first substantial questioning at trial, and after Renn had testified on direct-examination by his own counsel that there was no agreement between

Angels and Renns to transfer real property in N8598

the following record was made.

"Q. I believe you testified the other day that we were putting holes on your property, the property which is the subject of litigation in the two prior lawsuits. Was that putting holes in your property, did that have to do with putting in the septic tank and a seepage pit?
A. It was to dig a test hole, right. (RT 208/22-27)

(It was in fact and in accordance with defendants' trial exhibit A, to dig a seepage pit and put in a septic tank, paragraph 6)

"Q. Did you essentially advise us how to proceed on that?
A. Yes, I told you that area was known to be an area of soil which received seepage from septic tanks and cesspools without any trouble. I didn't see any reason to do it, but if you wanted to do it, you could do it. (RT 208/28 & 209/1-5)

(In accordance with defendants trial exhibit A, Renn informed Angels "a test hole must be done to get a "right to use the seepage pit (cesspool).") (third Paragraph)

Con't. "Q. Well, you know don't you that when you buy a piece of unimproved property for the purposes of building a home, that you should run a test to make sure that you, the seepage pit that it will accommodate a seepage pit or the testing et cetera?
Mr. Burkhardt: Excuse me, your honor, I really will object on this point, relevancy grounds. I don't see where this is going." (RT 209/6-12)

(In accordance with defendants trial exhibit A, Renn is advising and urging Angels to do such work on the subject property of N 8598 as "a part of Angels whole building job.") (Seventh paragraph)

Con't. "The Court: What is the relevance of this line of questioning?

Mrs. Angel: He said we didn't have an agreement. I intend to show that we did. In addition to that - -
The Court: Keep your voice down.
Mrs. Angel: In addition to which he testified from the stand that we did not have an agreement. Therefore, I have the right to rebut that, that we did have an agreement.
Mr. Burkhardt: It was conclusively settled in the very first lawsuit
Mrs. Angel: not the facts, not the facts.
Mr. Burkhardt: Satisfied by the superior court and the appeals court.
Mrs. Angel: The issue of his credibility.
The Court: You see the issue we have here in this case, the malicious prosecution under N 14705, that's essentially what we have.
Mrs. Angel: We have firsthand knowledge he committed fraud. goes to the issue of his credibility. If we can't address his credibility, we're being prejudiced in this trial.
The Court: Well, you can attack his credibility, but you've got to do it in the proper way, not by going up there disputing whether you had an agreement.
Doing that doesn't affect credibility, the credibility can be attacked by character or his reputation, things of that nature, opinion, character, evidence having to do with his reputation.
Mrs. Angel: If he committed fraud, that has to do - -
The Court: That may well be, but you're not going to make that an issue here. whether he committed, that's decided. There is no evidence he's committed fraud, there's no judgment he committed fraud. You have the opinion he committed fraud, but that opinion is not shared by the Courts.
Mrs. Angel: Just a minute, In N 8598, the Court did not find that Mr. Midlam had not committed - -
The Court: It's not Mr. Midlam.
Mrs. Angel: I mean Mr. Renn, they did not find he did not commit fraud. Just a minute - -
The Court: Just a minute, yourself, you are not going to come in here and make insinuations there's been no determination. Now we have specific rules

of evidence for attacking a witness's credibility. You follow those rules, that's all I'm going to suggest to you.

Mrs. Angel: The Court in N 8598 found we didn't have sufficient evidence, not total vindication.

The Court: There's no indication of fraud or anything else in that case. That's not the subject here.

Mrs. Angel: That's not what they found.

The Court: Mrs. Angel, you can attack his credibility by his reputation evidence, opinion evidence. But by just making a broad brush allegation that he defrauded us, that is not proper impeachment.

Mrs. Angel: Well, he has said we did not have an agreement. I think I have a right to prove we did have an agreement.

The Court: That litigation was decided in N8598. That has been decided. That has been decided, Mrs. Angel.

Mrs. Angel: Your honor, if I'm not going to be permitted to put on the defense, I'm going to move for a mistrial.

The Court: I'm going to allow you to put on your defense. You're cross-examining a witness. We're not going to rehash all the issues that were tried in N 8598. Now if you want to impeach this man by reputation, by opinion evidence as to his character, you can do so.

Mrs. Angel: How better to do it then on my own firsthand knowledge.

The Court: You can do that, go ahead cross-examine him, but you're not - -

Mrs. Angel: I can't do it without talking about fraud he committed in N 8598.

The Court: I'm not going to sit here and conduct a course in how to conduct a trial, very frankly, that's your burden, that's your responsibility. I don't think this inquiry here is relevant.

Mrs. Angel: It proves his fraud, your honor.

The Court: It's not relevant. Okay, make your motion.

Mrs. Angel: I move for a mistrial.

The Court: Give me some grounds.

Mrs. Angel: That I'm not being permitted to put on a defense to attack his credibility

The Court: Your motion is denied. You may proceed.
Mrs. Angel: I'd like to move for one more thing, I'd like to move to disqualify you on the basis of prejudice.
The Court: That's denied." (RT 209/17 thru 212/17)
Con't. "Mrs. Angel: Your honor, move to have this evidence accepted into evidence.
The Court: Your request is denied. You may proceed with your cross-examination.
Mrs. Angel: Your honor, I move for a mistrial on the basis - -
The Court: Don't argue that before the jury. You want to make a motion, you come up here.
Mrs. Angel: I made the motion up there.
By Mrs. Angel:
Q. Mr. Renn we did put a seepage pit on your property; is that correct?
A. Yes
Q. Did we do that with your approval?
A. Yes
Q. Did you suggest that this would be a part of our whole building job?
A. I told - -
Mr. Burkhardt: I object, that's ambiguous.
The Court: Sustained.
Mrs. Angel: It's, it's in the document he just read from.
The Court: Well the question is ambiguious. I'm going to sustain the objection.
Mrs. Angel: Your honor, it's in the document, he wrote it, I think he understands, he said in the document, this will be a part of our whole - -
The Court: Mrs. Angel, that document is not received. That document has been only marked for identification.
Mrs. Angel: Your honor, he said that we had no agreement.
The Court: Just a moment, just a moment. That matter has been discussed here at side bar. The rulings have been made, Mrs. Angel, please don't bring it up anymore. You may proceed with your cross-examination. You may cross-examine him about what he's testified to.
Mrs. Angel: we stipulated that everything of

record in the prior lawsuits could come in as evidence. Mr. Burkhardt and I stipulated to that. This is of evidence in the prior two cases.
Mr. Burkhardt: Objection, your honor, that was not the stipulation.
The Court: Well - -
Mrs. Angel: That was the stipulation. (RT 212/21 thru 214/9)

(Whereupon Mrs. Angel specificially asked that the Court Reporter be permitted to read the stipulation and whereupon the Court, without explanation, flatly refused.) (AA 416)

Certainly Angels had every right to have trial exhibit A admitted under the Courts own statement of stipulation on admissible evidence, and Angels had every right to have trial exhibit A admitted as documented direct evidence in rebuttal to Renns' prior testimony for purposes of impeachment and establishing Renns lack of credibility, and Angels had every right to have trial exhibit A admitted as circumstantial evidence in establishing their first affirmative defense. Such rulings constitute a violation of Evidence Code §604 and Evidence Code §780 (g), (h) and (i).

The Courts argument that there was no indication of fraud or anything else in N 8598 fails since such lawsuit is entitled "Complaint for a specific perfor-

mance of agreement to transfer real estate, fraud, misrepresentation and false promise." (AA 272)

No Court anywhere has found that Renn did not commit fraud against Angels in N 8598. Plaintiffs trial exhibit 2, judgment in N 8598, reads:

"It is hereby ordered, adjudged, and decreed that the motion for judgment of nonsuit in favor of defendants Louis H. Renn and Mildred M. Renn be and the same as hereby granted in favor of said defendants on the first and second causes of action only." (1/27-28 & 2/1-3)

In accordance with Angels complaint N8598, Angels' first cause of action was for specific performance of oral contract (AA 272) and Angels' second cause of action was for breach of written contract based on correspondence between parties (AA 276). Angels third cause of action was fraud and has been determined nowhere by any Court. Judgment N 8598 was read in its entirity to the jury at trial herein by Renns counsel. (RT 67/23 thru 69/3)

Renn was further permitted to testify as to judgment N 8598 on direct-examination by his own counsel as follows:

"Judge Froehlich said, ... but Mr. Renn thought what he was doing, did what was right and proper." (RT 182/27-28 & RT 183/1)

In the absolute minimum, Angels should have been permitted rebuttal questioning regarding Renns' prior testimony in accordance with Evidence Code §604 and with Evidence Code §780(g), (h) and (i).

Angels were denied material questioning as to exhibit "B" as follows:

> "Q. At the time you delivered this draft to the Angels was there anything unacceptable to you contained in this contract for the purchase of real property?
> Mr. Burkhardt: Objection, your honor, it's irrelevant.
> The Court: sustained.
> Mrs. Angel: Your honor, how can I attack this man's credibility?
> The Court: Just a moment. We have been through that, Mrs. Angel, now just proceed." (RT 215/25 thru 216/5)
> "Q. Well, what I'm saying is that its' called for equal payments over a period of five years; is that essentially what the contract calls for?
> A. That and ample other conditions.
> Q. Could you tell me what the other conditions were?
> A. Well, it's - -
> Mr. Burkhardt: Object at this point, your honor. The document speaks for itself. It's unfair to have the witness characterize the lengthy rather complex document.
> The Court: Well, the document does speak for itself."(RT 217/8-18)

Such questioning about admitted evidence was entirely relevant and even though the document spoke for itself, it had said nothing to the jury, and Angels planned subsequent questioning predicated upon

Renns' answers were silenced forever in violation of Evidence Code §§768-769.

- As to defendants' trial exhibit C, Angels again were not permitted to question or read from such exhibit as follows:

"Q. Okay, Mr. Renn that document reads from top but follow along with me, Should I Louis Renn for any reason beyond my control not be able - -
The Court: Just a moment. The document speaks for itself. It's admitted into evidence. The jury can read. They'll be able to read it. No point in our sitting here having you or Mr. Renn read that document.
Mrs. Angel: Mr. Burkhardt was permitted to read an entire judgment et cetera in his - -
The Court: I don't want to argue with you Mrs. Angel, that's my ruling.
Q. Mr. Renn, doesn't that document state, that except for reasons beyond your control that you will sell the property to Thomas Angel?
The Court: Don't answer that, Mr. Renn. Mrs. Angel, please, I'm not going to allow that type of questioning as to content of that instrument. That instrument speaks for itself. The jury is going to be given that instrument. They can read it. They will know what it says.
Mrs. Angel: How can I ask him questions about it if I can't ask him questions about it?
The Court: I don't want to argue with you, Mrs. Angel, please, please abide by my rulings.
Q. Mr. Renn, didn't you say you had an agreement to sell the property to my husband for $80,000?
The Court: You're stubborn, Mrs. Angel, the document says that and its' in evidence. It's going to be before the jury. Now, the jury can read it. Saying it again is not going to solve any useful purpose. I've made my rulings, please refrain from asking questions about the content of that instrument, meaning defendant's C, it's in evidence.

Mrs. Angel: And I'm not permitted to ask him any questions about it?
The Court: No." (RT 220/9 thru 221/17)

And once again, the document that spoke for itself had said nothing to the jury, and Angels planned subsequent questioning predicated upon Renns' answers were silenced.

Additionally, subsequent questioning of the witness would make no sense to the jurors without the foundational information contained within the particular document. Such ruling violated Evidence Code §§768-769.

Further, upon direct-examination of Renn by Renns' counsel, Renn testified as follows:

"Q. And did you ever sign a contract to sell your property to the Angels?
A. No.
Q. Did you ever finally reach an agreement with them, for the terms of sale of the property?
A. No." (RT 180/3-8)

Angels had a fundamental legal right under Evidence Code §604 to rebutt Renns' prior testimony. Such court ruling violated Evidence Code §780 (g), (h) and (i).

Total withholding of evidence from the jury until deliberation handicaps the jurors understanding of

the case during trial and places an undue burden on jurors during deliberation to not only decide but to find and consider evidence not addressed as to content and intent during trial.

When documents are admitted into evidence, parties have a fundamental right to question the maker or signer of such document as to the content therein and his intent thereto.

Additionally, and regarding defendants trial exhibit C, the Court stated as follows:

> "In that trial the trial Court made a decision there, it was appealed, appealed and appealed. And everyone of the appeals affirmed the decision of the trial Court. Now, you may think its wrong but the appellate courts said that the trial Court was correct." (RT 225/26 thru 226/2)

In accordance with all of plaintiffs' trial exhibits of documents filed with the upper Courts of which the Court herein took judicial notice, there was never a consideration nor determination of Angels' causes for specific performance of a contract to transfer real estate, etc. by the upper Courts. The Court, in addition to not permitting Angels to put on a defense, was clearly mistating prior Court decisions in Renns favor. From the day Judge Froehlich ruled non-suit on Angels first two causes in

N 8598, no Court has considered such causes nor has any court ever considered causes three, four and five thereto.

All trial exhibits herein written by, signed by, or done at the request of Renn or Angels attorneys in N 8598 certainly influenced Angels in filing N 14705. Since case N 14705 was about what happened in N8598, anything that happened in N 8598 was entirely material and relevant to Angels state of mind and motives in filing N14705.

The Courts continued position that adverse Court rulings in both N 8598 and N 14705 automatically erased Angels beliefs, indeed Angels first hand knowledge regarding Renn and Angels attorneys is preposterous. The Courts position fails as a matter of law, but more specifically it fails from a complete lack of reason.

- As to defendants trial exhibit G, after Renn had testified to having signed a declaration in N 8598 stating he had entered into a contract for the sale of the subject real property and had accepted and received part payment applied toward the purchase price under the contract on October 31, 1978, (RT 277/6-12) Angels questioned Renn as follows:

"Mr. Renn, you weren't really bound to sell the property on October 31, 1978; is that true?
Mr. Burkhardt: objection, calls for a conclusion of law this witness is not competent to testify to, and the form of the question is argumentative.
The Court: Sustained. (RT 277/27 thru 278/4)

Since Renn was competent to testify to such conclusion of law via a declaration under penalty of perjury in N 8598, then certainly he was competent to testify to such conclusion of law herein at trial, and indeed, Renn was permitted on redirect-examination by his own counsel to testify as follows:

"Q. All right, did you ever feel that you had a binding commitment to the Angels to sell your property to them?
A. No." (RT 313/1-3)

Just because a question inherently involves an answer that would diminish the witnesses credibility, such question is not argumentative, but rather material and necessary in establishing the truth. The courts ruling violates Evidence Code §604 and Evidence Code §780 (g), (h) and (i).

- As to defendants trial exhibit J, the record states as follows:

"Q. Mr. Renn, prior to the Angels recording a lis pendens on the subject property, had you ever had a lis pendens recorded on that particular piece of

property before?" (RT 290/28 thru 291/2)
"A. I don't ever recall being involved in a lis pendens any time except this time." (RT 291/16-17)
The Court: I, very frankly, under 352, that, all that does is confuse the issues. Doesn't solve the problem we have before us. In balancing the confusion with the probative value of this type of evidence, I'm not going to allow it in.
Mr. Burkhardt: Could I ask the Court to caution her, this document refers to a lawsuit some 20 years ago, refers to fraud. I think her intent is to some how get before the jury that he was sued for fraud.
The Court: This lis pendens is not going in.
Mr. Burkhardt: nor should any reference to the prior lawsuit for fraud. That's what I request an order to that effect.
Mrs. Angel: This creates a pattern of behavior, committing fraud on someone else. There it addresses directly his credibility and our state of mind.
The Court: Have you read those evidence codes?
Mrs. Angel: I have read them.
The Court: This is not coming in." (RT 292/7-24)

Even though Renn was permitted to testify that he didn't recall being involved in a lis pendens any time except with Angels, Angels were not permitted to rebut such testimony with direct documented evidence. The courts ruling violated Evidence Code §604.

In regard to defendants trial exhibit N & O which were specificially offered to contradict Renns position that Angels had lengthy prior knowledge of Mrs. Renns' health condition, Angels were not permitted questioning of Renn in such regard as follows:

"Q. If you look on the second page, we noticed your wife's deposition approximately two months after she said she could competently testify; isn't that correct, if you look back at exhibit N?
Mr. Burkhardt: objection, the document speaks for itself.
The Court: Sustained. Don't answer the question, please, I sustained the objection." (RT 307/16-23)

The courts ruling violated Evidence Code §604. In regard to Angels questioning of Angels prior attorney, Dodge testified as follows:

"A. ... My recollection is that I was retained to argue that the settlement had been entered into without your authorization, and that's what I did.
Q. And you did that then at the motion hearing; is that what you're saying, If I understand you correctly?
A. Yes." (RT 419/22-27)
Q. Could you point out where you represented to the Court that the settlement was unauthorized; it's just a few pages?
The Court: Is that for your benefit or for the jury's benefit? Or is he going to point this out, whose benefit is it going to be?
Mrs. Angel: I believe he said he did represent to Court - -
The Court: I understand that you want him to point it out somewhere in the transcript of that proceeding.
Mrs. Angel: The point is, it was not in the transcript.
The Court: How are you making that point before the jury? You are not going to have the transcript in evidence. That's just what you got through saying.
Mrs. Angel: His testimony is evidence, isn't it.
The Court: I guess so. I don't know at this juncture.
Mr. Burkhardt: I do know, your honor. And I will object. It's thoroughly improper impeachment. This gentleman is not on trial. He was retained to

represent her and he did it. I see absolutely no connection with the essential allegation in N14705, which is the affirmative defense in this case that my client, who's sitting here next to me, bought Mr. Midlam, has got nothing to do with any of that.

Mrs. Angel: Bought our attorneys and that is not just Mr. Midlam.

Mr. Burkhardt: Why don't we read from it, the complaint?

The Court: Ask him if Mr. Renn ever paid him any money or anything to throw the case; ask that.

Mrs. Angel: I don't suspect he would answer that, if he had.

The Court: He's under oath, you know.

Mrs. Angel: I don't expect that would make any difference, if he was willing to take money for doing something dishonest, would he be willing to get up here and testify to it.

The Court: That's for the jury to determine. That's for the jury to determine. That's for the jury to determine. I'm going to sustain the objection, I don't think this is relevant to the issues that are pending in the case that's before us. We're not going to rehash, we are not going to rehash what happened in N 8598. We're not going to rehash what happened in 14705. The question is whether by filing 14705 you engaged in that malicious prosecution and caused an intentional infliction of mental distress. That's the issue. Not whether they did a good job or a bad job or anything else. So we're not going to rehash it. It's not relevant.

Mrs. Angel: Well, I'm not trying to get at a good job or bad job.

The Court: I've made my ruling. It's not relevant. Don't pursue it any further." (RT 420/3 thru 421/26)

Surely, after Dodge had testified that he had represented to the Court in N 8598 that the settlement therein was unauthorized, Angels had a fundamen-

tal right to disprove such testimony by way of questioning Dodge as to the actual reporter's transcript of such hearing. Such court ruling violated Evidence Code §604, and Evidence Code §780(g), (h) and (i).

The Court both indulged in and permitted prolonged, improper and needless arguments regarding Angels questioning. Indeed, the Court ruled that questioning which could disclose fraudulent acts of Dodge in N 8598, and absolutely impeach Dodges prior testimony, was irrelevant. This ruling was made after the Court instructed Angels to ask Dodge if Renn had paid him any money or anything to throw case N 8598. Such ruling and instruction are inherently contradictive, and serve only to reinforce the Courts continued position that Angels must either have direct proof of a pay-off or a confession to prove case N 14705. This is against law since fraud can be proved circumstancially and usually can only be proved circumstancially. The Courts' continued position is that Angels may testify that they were sold-out by certain individuals or ask those certain individuals if they had sold Angels out, but nowhere could Angels

attempt to prove or disprove such testimony by way of documentary written evidence.

The Courts position on the law and what is evidence and is not evidence alternates always in such a way as necessary only to facilitate Renns position.

In a further attempt to prove Dodges' deceptive representation of Angels in N 8598, the record reads as follows:

> "A. I recall sending you a letter in which I included a post script to the effect that I was returning the promissory note, because I thought you should have it along with all the other documents that were yours in connection with the transaction.
> Q. Didn't you say that it probably belongs with all your other files?
> A. I suppose I did.
> Q. Mr. Dodge, Did you know that by keeping that promissory note for a long period of time would amount to ratification of that settlement?
> Mr. Burkhardt: objection, assumes facts not in evidence.
> The Court: Sustained
> Mrs. Angel: What fact does it assume not in evidence; if I may?
> The Court: I've sustained the objection. Proceed. You're not going to inquire in that subject. We're not going to debate the matter each time, Mrs. Angel." (RT 422/8-25)

Such ruling violates Evidence Code §780 (g), (h) and (i).

Angels were not permitted to question Midlam who had represented them in N 8598 as follows:

"Q. In view of the letter that you've just read that you wrote to us, did you feel that we had a reasonable possibility of prevailing at trial?

Mr. Burkhardt: Objection, your honor I don't think his opinion in that is relevant to these proceedings.

The Court: I'll sustain the objection. That letter has to do with the first lawsuit. This lawsuit is about the second lawsuit. So it doesn't go to prove any fact in issue in this lawsuit. The sole question is whether or not you had probable cause to file N 14705.

Mrs. Angel: But N 14705 had to do with N8598, the sell out occurred in N 8598 not in 14705? (RT 455/22 thru 456/5)

The Courts pronouncement that the sole question at trial herein was whether or not Angels had probable cause overlooks totally Angels' affirmative defense. Indeed, Angels were cut off from any defense when they were consistently denied questioning of witnesses regarding N 8598 and again Angels had a fundamental right to question this witness as to his intent in writing evidence, evidence admitted as defendants Q.

Midlams representation of Angels in N 8598 was the primary subject of Angels complaint N 14705 and thereto Angels' first affirmative defense herein.

However, each time Angels ask the material and essential questions predicated upon a developed foundational questioning, Angels were consistently,

and without exception, prohibited from obtaining such evidence by improper prejudicial Court rulings. (RT 450/24 thru 496/27 & 504/3 thru 505/14)

The Court instructed the jury on Angels first affirmative defense as follows:

> "They set forth a first affirmative defense. That probable cause existed for instituting civil action number N14705, because plaintiff actually bought the defendants' attorneys in case number N8598. That's an affirmative defense. She has the burden of proving that allegation." (RT 381/20-24)

However, throughout the questioning of Midlam as with questioning of other witnesses, the jury was repeatedly informed by the Court as follows:

> "The Court: Well, we keep mixing apples and oranges. The issues in case number N8598 was specfic performance and some damages causes of action. That case has been laid to rest. In 14705, was filed by Mr. & Mrs. Angel, wherein they wished to set aside the judgment of N 8598 because of extrinsic fraud. Now if we can, the sole issue is whether or not they had probable cause to file- N 14705. Now, we are not going to rehash the - issues that are contained in 8598. I have told you repeatedly, Mrs. Angel, we're not going to do that.
>
> Mrs. Angel: Your honor, I can't talk about 14705 without talking about what I put into the pleadings there. And the pleadings were that Mr. Midlam sold out our case.
>
> The Court: Now, just a minute. Once again ladies and gentleman, you are to totally disregard, if you have any evidence of that effect, you can bring it into this matter right now. That's the basis of your extrinsic fraud case. If you have any evidence of that other than your blind statement, your

statement. If you have any evidence of it, prove of it, bring it forward." (RT 458/21 thru 459/13)

The Court: Ladies and gentlemen, just a moment. The issue of the competency of Mr. Midlam and his representation is not in issue at this case at all.

The case that we're trying, the issue is whether or not Mr. & Mrs. Angel have probable cause to believe that extrinsic fraud took place in case no. 14705. Not whether she was adequately represented, not whether she losts or won, or whether the attorneys did a good job, or that the judge was right or wrong.

The issue is whether or not she had probable cause to file 14705. Which alleged extrinsic fraud, that Mr. Midlam and other attorneys, her attorneys, plural, were bought out. That's the issue, not whether he did a good job or bad job or anything else.

Mrs. Angel: one of my basic allegations in N14705, when I argued in front of judge Lopardo was that this man is very good. Therefore the performance at trial could not have been justified except that it was an intentional sell out.

That's circumstantial, I grant you, but when you have a contract, a complaint for specific performance of a contract to transfer real property, and this attorney does not plead it at trial - -

Mr. Burkhardt: Your honor, I must object to these statements. They're totally unfounded, inaccurate, they're not in evidence.

The Court: Yes.

Mrs. Angel: I'm trying to get them in evidence.

The Court: Please, Mrs. Angel, I would ask that you stick to the issues that are present in this court. And that has only to do with probable cause to file N 14705." (RT 463/26 thru 464/28)

The Court: ... Really, I don't know as to whether it's relevant or not. In this particular case, the question was not whether you were ably represented in case number 8598, the question is whether or not your attorneys were bought, which you allege in 14705, which is the basis for the extrinsic fraud.

Mrs. Angel: I don't see how I can address that unless I talked about what he did at trial.

The Court: I tell you, Mrs. Angel, we have tried very hard, you know, what you alleged in the lawsuit 14705. You alleged extrinsic fraud. The fraud being that your attorneys were bought by Mr. Renn. You made that allegation.

The question here is whether or not you had a good faith belief whether there was probable cause to make that allegation. Now, you can prove that. There is some factor that entered your mind, that gave you probable cause, that's what we're here for.

Mrs. Angel: These are the facts what he did at trial was not negligence, I don't believe. I believe it was intentional.

The Court: Well, again all you've got is your statements and you have - - Once again, ladies and gentlement, her opinions, her conclusions are not evidence. They're to be totally disregarded by the jury, until such time that she may make those kinds of statements under oath, she's not under oath at this time. (RT 486/18 thru 487/14)

When the Court institutes such redundant, prolonged arguments before the jury, Angels have no choice but to respond in accordance with their knowledge of the facts and applicable law in order to make a record. For the Court to then instruct the jury to the effect Angels were trying to present evidence improperly was an extremely demeaning and prejudicial process to endure and suffer. Additionally, the Courts labeling of Angels' statements as blind statements is obvious prejudice.

The Courts redundant and prolonged arguments forti-

fied the Courts continuing and continued position that Angels must rely upon direct proof of a pay-off or indeed a confession in order to prove N 14705 and their first affirmative defense thereto.

Angels were repeatedly denied the opportunity to present evidence which was material in circumstantially establishing fraud as to N14705 and their first affirmative defense thereto.

The Courts intention to permit no jury finding as to Angels first affirmative defense is demonstrated with such redundancy as to constitute over-kill indeed -the sole issue is probable cause, etc. etc. etc. -

When comparing defendants trial exhibit R, which establishes that Midlam was unauthorized in settlement of N 8598 and defendants trial exhibit S, which establishes Midlam made a fraudulent record as to such authority, it is undeniable that such fraudulent conduct is material, indeed vital, to Angels first affirmative defense. Defendants trial exhibits R & S were properly identified and verified by the maker therein, attorney Kevin Midlam. Yet and despite Angels first affirmative defense and such direct

documentation, the Court limited their purpose as evidence as follows:

"By the way, ladies and gentlemen, all of this evidence is coming in for the sole purpose of determining whether or not she had probable cause to reasonably believe that extrinsic fraud took place. That's what she alleges occurred. That the attorneys were bought out, as she alleges it in N 14705. That's the sole issue here. And I'm allowing it in for that sole purpose.

Mrs. Angel: I'd like to ask that exhibit R, that's been identified, be admitted into evidence? (RT 476/28 thru 477/8)

The Court: It will be admitted. But again, ladies and gentlement, not for the truth of the contents as contained in the letter, but to establish whether or not Mr. & Mrs. Angel had probable cause, reasonable belief that their allegations as contained in 14705 were true.

That there was a successful outcome of that litigation, for that limited purpose, that letter comes in, not whether there was a good result in 8598, but whether they had a probable cause and reasonable basis for their beliefs.

Mrs. Angel: Was that last exhibit identified as exhibit?

Court: S

Mrs. Angel: S. I move that be entered, your honor.

Mr. Burkhardt: no objection.

The Court: All right. It will be admitted again for that limited purpose. (RT 477/13-27)

Since such documents proved Midlams' lack of credibility, the courts ruling violated Evidence Code §780 (g), (h) and (i). Further, since Angels had alleged fraud as to Midlam in N14705, his credibility was an issue therein and herein. Pursuant to such

evidence code, the credibility of any witness at trial, is proper evidence for the trier of fact.

Clearly two set of rules were operative throuthout trial herein, one for Renn and one for Angels, and such rules operated always to secure judgment in Renns' favor.

The courts allowance of an award of damages in the amount of $50,000. pursuant to the cause for intentional infliction of emotional distress despite plaintiffs admission of suffering no emotional distress was presented to the courts below as follows:

> "The Court: The problem I have, very frankly, I'm quoting from my notes when you asked Mr. Renn of the emotional effects of the lawsuit, his quote, damned annoyed. I wrote it down.
> Now, there has to be some severe emotional effect that affects the party's relationship with his other contacts in the world.
> Now, what do we have here? All that I have in the evidence, as far as any effect is that statement, he was damned annoyed." (RT 353/25-28 & 354/1-5)

Being "damned annoyed" does not constitute emotional distress as defined in BAJI 12.72. (AA 329) Nor does being "damned annoyed" constitute reaction legally sufficient to comply with BAJI 12.74 wherein extreme and outrageous conduct is defined in relevant part as follows:

"Extreme and outrageous conduct is not mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." (AA 331)

The courts allowance as only evidence of actual damage those checks which plaintiff admits may not have been made pursuant to litigation sued upon herein was presented to the courts below as follows:

The only evidence presented as to alleged actual damages were checks Renn made payable to attorneys in the amount of approximately $4,300. In this regard, the following record was made.

"The witness: Mr. Burkhardt, I recognize these, because I made note on them, the checks as to what the money is for.
By Mr. Burkhardt:
Q. For example check number 62 for $800 is check no. 11371; is that right?
A. Yes
Q. And have you written something on the face of that check?
A. Land litigation.
Q. And when did you make that notation?
A. At the time I wrote the check." (RT 188/27 thru 189/9)

However, on cross-examination as to such testimony the record reads as follows:

"Q. Mr. Renn, do you consider lawsuit N14705 to be over real property?
Mr. Burkhardt: Objection, his what he considers the lawsuit to be is irrelevant.
The court: Sustained
Mrs. Angel: Your honor in plaintiff's Exhibit 61 through 67, on those checks, he makes a notation,

land litigation, land sale litigation, legal land suit, land execute on land sale. So he obviously must have felt that lawsuit 14705 -
The Court: Are you arguing now? That's the evidence, that evidence, that's in. Now you can argue when it comes time to argue before the jury as to what you think that evidence shows.
Mrs. Angel: I can't ask him?
The Court: I don't think it's relevant." (RT 297/14 thru 298/1)

The only way in which Renn had identified these checks was by his notations thereto, and since it was the original case N8598 which involved land litigation and there was no sale of the subject property involved in case N14705, Angels had every right to ascertain from which litigation the checks applied. The record states futher as follows:

"Q. Mr. Renn, exhibit 61, that's a check for $861.13; is that correct?
A. Yes, that's on the face of it, yes.
Q. And is that for legal expenses as to case 14705?
A. I don't know which action it related to.
Mrs. Angel: Then, your honor, I move to not admit this evidence, if he doesn't even know which case it goes to. They're offering this for their damages. He doesn't even know which case.
The Court: The evidence had been admitted into evidence at this point. Again you can argue that at the time the matter is submitted to the jury." (RT 299/1-12)

But of course, you can not argue to the jury that evidence was improperly admitted by the court.

Angels had objected originally to such checks being

admitted into evidence without the corresponding attorneys' bills as follows:

> "Mrs Angel: I would object. He's leading, also if he has the bills for those particular checks, I would like to see them. I've noticed them to be produced.
> Mr. Burkhardt: Objection, your honor, that's a speaking --
> The Court: Yes, Yes, Ma'am. It's a speaking objection. Your objection is overruled." (RT 188/18-24)

> "The Court: She had objected to it, because of the statements, she hadn't seen the statements.
> Mrs. Angel: That is right. I would like to see the statements.
> Mr. Burkhardt: Excuse me, your honor, I don't want a speaking objection. We handled that matter off the record already.
> The Court: They've been properly identified. They will be admitted into evidence." (RT 206/12-20)

If such matter were handled off the record, Angels had no knowledge of such. Admitting of such evidence (checks) assumed a material fact (bills were received) not in evidence which additionally had been properly noticed for production at trial. (AA 129 & 130) Angels objection was improperly overruled and noticed relevant production denied improperly.

In accordance Evidence Code §765 and Love v Wolf (1964) 226 Cal 2d 378, 38 Cal Rptr. 183, "An examiner may not ask a witness a question that contains an assertion or assumption that a fact exists which has not been established by any evidence." This type of question hinders, rather than promotes, effective

ascertainment of the truth -

more especially since Renn could not identify to which litigation the checks belonged -Such question misleads the trier of fact, because of the suggestion, inherent in the question. Such court ruling further violates Evidence Code §403.

All such questions were presented to the courts below as a violation of Angels' right to due process and equal protection under the law in accordance with the Fourteenth Amendment of the United States Constitution.

REASON FOR GRANTING WRIT

1. To Prevent the San Diego Courts from subjecting persons proceeding in pro se, who are not attorneys, to a bogus trial wherein every legal right is maliciously stripped away.

To deny the rights of one individual is a dangerous precedent and a contradiction to the fundamental concept upon which justice in this country was originally founded. "Justice denied anywhere is a threat to justice everywhere." Martin Luther King

CONCLUSION

This petition should be granted because the Supreme Court of the State of California has ruled in such a way as to deprive Angels due process of law and equal protection under the law provided for in the Fourteenth Amendment of the United States Constitution. Of great importance is the fact that the States Court decision, if allowed to stand, defeats public trust, and destroys human dignity.

Petitioners, Thomas R. Angel and Loretta C. Angel, pray that a Writ of Certiorari issue to review the decree of the Supreme Court of the State of California herein.

Respectfully Submitted,

Dated: February 12, 1986

Thomas R. Angel and
Loretta C. Angel

Petitioners pro se

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

Dec 30 1985

I have this day filed Order

REVIEW DENIED

In re: 4 Civil *No.* D001813

Louis H. Renn

vs.

Thomas R. Angel & Loretta C. Angel

Respectfully,

Clerk

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LOUIS H. RENN, Plaintiff and Respondent, v. THOMAS R. ANGEL, et al., Defendants and Appellants.	F I L E D Kenan G. Casady, Clerk NOV 6 1985 Court of Appeal Fourth District D001813 (Super. Ct. No. N23298)

THE COURT:

The Petition for rehearing is denied.

Signed by: Staniforth

STANIFORTH, ACTING P.J.

Copies to: All Parties

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

F I L E D
Keenan G. Casady, Clerk
OCT 1 5 1985
Court of Appeal
Fourth District

LOUIS H. RENN, Plaintiff and Respondent, v. THOMAS R. ANGEL, et al., Defendants and Appellants.	D001813 (Super. Ct. No. N23298)

APPEAL from a judgment of the Superior Court of San Diego County, Don Martinson, Judge. Affirmed.

A jury awarded Louis H. Renn damages in the sum of $154,331.13 plus costs against defendants Thomas R. Angel and Loretta C. Angel (Angels) for their malicious prosecution and intentional infliction of emotional distress. The elements of the award were $4,331.13 in special damages (attorney fees incurred in defending the lawsuit filed by Angels against Renn in case No. N14705), $50,000 in general damages and $100,000 in punitive damages. Angels contend reversal

2 of the judgment is ⊥ warranted on grounds there is no evidence of improper motive, no evidence of emotional distress, admissible evidence was improperly excluded, jury instructions were improperly refused, and no evidence of Angels' financial status was presented to support the award of punitive damages.[1]

PROCEDURAL BACKGROUND

The instant appeal is the latest in the protracted series of litigations between Renn and Angels which has as its genesis a complaint filed by Angels in 1977 for specific performance of a real estate agreement with Renn to buy property owned by Renn. (Case No. 8598.) The complaint also joined causes of action for fraud, misrepresentation and false promise. At that time, both parties were represented by counsel. The cause eventually went to trial and at the end of Angels' case-in-chief, the court announced its intention to grant nonsuit in favor of Renn on the cause of action for specific performance. Upon Angels' direction, Angels' attorney Kevin Midlam settled the remaining causes of action of the complaint.

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[1]Angels represented themselves at trial in propria persona. They appear in this appeal in propria persona as well.

Thereafter, the court entered a stipulated judgment in which nonsuit on the cause of action for specific performance was granted in favor of Renn and the remaining causes of action were dismissed pursuant to the stipulation of the parties. In consideration for dismissal of the remaining causes of action and Angels' waiver of the right to appeal the judgment 3
and waiver of findings of fact and conclusions of law, Renn executed a promissory note for $2,000 to Angels.

Then, Angels, through new counsel, attempted to have the stipulated judgment and settlement agreement set aside under Civil Code section 473 on grounds they had not authorized their attorney Kevin Midlam to accept the promissory note. On appeal from the order denying the motion, this court affirmed the judgment. Angels twice petitioned this court for rehearing and petitioned for hearing at the California Supreme Court. The petitions were denied as were several writs. The United States Supreme Court also denied a petition for writ of certiorari. Thus presumably ended case No. 8598.

Undaunted, however, Angels returned to the lower

court and filed another action, case No. N14705, to set aside the judgment in case No. 8598 for extrinsic fraud. The basis of the claim of extrinsic fraud was Angels had not authorized Attorney Kevin Midlam to accept the proposed settlement agreement. They also claimed Midlam's performance at trial was so bad it had to be purposeful and therefore constituted fraudulent conduct. Angels contended the only excuse for Midlam's poor trial performance was he was bribed by Renn. The trial court granted summary judgment in favor of Renn on res judicata grounds and for failure
4 to state any facts in their moving ⊥ papers and declarations to support the claim Midlam was paid to lose the lawsuit (case No. 8598). Angels appealed the grant of summary judgment to this court. We affirmed the judgment and imposed sanctions against the Angels for abuse of appellate process. (See 4 Civ. No. 24901, filed Jan. 24, 1983.)

Undeterred, Angels again sought to set aside the original judgment in case No. 8598 raising many of the same issues previously raised in earlier proceedings. Denial of the motion was accompanied by an order imposing sanctions under Code of Civil Procedure

section 128.5. Angels filed a motion for reconsideration of the order denying the motion to set aside the judgment. The motion was denied and additional sanctions were imposed. Angels appealed. The appeal was temporarily dismissed for Angels' failure to pay sanctions previously ordered in 4 Civ. 24901. When Angels then paid the sanctions, the appeal was reinstated. This court affirmed the judgment noting the appeal made the same contentions twice rejected by us in the two prior appeals. We imposed $1,000 in sanctions against Angels stating "Enough is enough. This appeal is frivolous." (4 Civ. No. 31142, p. 4.)

On August 5, 1983, Renn, having had quite enough, filed a complaint for damages for malicious prosecution and intentional infliction of emotional distress. In substance, the complaint alleged by filing the complaint in case No. N14705 Angels | "acted 5 without probable cause . . . in that they did not honestly and reasonably believe that there were grounds for the action because they had no credible evidence with which to support the allegations of the Complaint." The complaint further alleged Angels acted maliciously in bringing the action in case No.

N14705 in that they were determined to vex, annoy and harass Renn and desired to cloud title to the real property sold by Renn to a third party. The second cause of action for intentional infliction of emotional distress alleged Angels' conduct in bringing the action in case No. N14705 was "intentional and malicious and done for the purpose of causing [Renn] to suffer humiliation, mental anguish and emotional and physical distress."

Angels answered the complaint, denying all allegations of the complaint and asserting four affirmative defenses. The first affirmative defense alleges "[p]robable cause existed for instituting civil action number N14705 because [Renn] actually bought [Angels'] attorneys in case number N8598." The second affirmative defense alleges Angels were not permitted to conclude discovery in case No. N14705. The third asserted affirmative defense alleges Renn fails to state facts sufficient to constitute causes of action. The fourth asserted affirmative defense alleges Renn "made a fraudulent claim of reliance upon judgment [in] N8598, he is estopped as to the instant lawsuit."

DISCUSSION

I

As a preliminary matter, we must first briefly address Angels' contention the principles of res judicata operate as a bar to Renn's lawsuit for malicious prosecution. In support of this claim, Angels assert denial of Renn's pretrial motion for an order requiring them to furnish security on grounds they were vexatious litigants conclusively established they did not institute the action in N14705 from improper motive. Angels additionally assert the decision granting summary judgment in favor of Renn in N14705 and the subsequent decision of this court affirming that judgment conclusively resolved the issue whether "Angels were vexatious and motivated solely to harass and annoy in N 14705." They conclude the issue "was determined favorable [sic] toward Angels." These arguments are totally devoid of merit.

The doctrine of res judicata gives conclusive effect to a former judgment in subsequent litigation involving the same controversy.

> "The doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a

> court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action." (Bernhard v. Bank of America, 19 Cal.2d 807, 810, emphasis added.)

7 (See generally, Witkin, 3 Cal. Procedure, Judgment, § 188 et seq.)

It would take more than a stretch of legal reasoning to conclude as Angels have the issue whether they commenced proceedings in N14705 from improper motive was litigated in N14705. Even if we could conclude (with the greatest stretch of legal reasoning) the issue was litigated, we cannot conclude the issue was resolved favorably to Angels.

Angels inappropriately rely upon language of this court's unpublished decision in 4 Civ. No. 24901 as evidence this court "specifically excluded improper motive on the part of Angels." In reaching the decision to impose sanctions against Angels for abuse of appellate process, we utilized a two-pronged definition of frivolous appeals to determine whether Angels' appeal was frivolous. We wrote the first definition of frivolous appeal is "when an appeal is taken for an improper motive representing a time-consuming and disruptive use of the judicial process."

The second definition of a frivolous appeal is '"when it indisputably has no merit -- when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]'" (4 Civ. No. 24901.) Without deciding whether the appeal was taken for an improper motive, we determined the appeal was frivolous on grounds the appeal was time consuming, disruptive and completely without merit. 8

The issue of Angels' motive in instituting the proceedings in N14705 was not the subject of any of the prior litigations between Angels and Renn and therefore the principles of res judicata are not called into play to bar Renn's suit for malicious prosecution.

II

Malicious Prosecution

Angels contend the judgment must be reversed because there is no evidence of lack of probable cause and no evidence of malice. It appears the basis of Angels' complaints in this regard is evidence, in the form of documents submitted in case No. N8598 which were prepared by either Angels or their attorneys, was improperly admitted and the court's refusal to give Angels' requested instruction on probable

cause precluded the jury from considering the merits of case No. N14705 only.

To prevail in an action for the malicious prosecution of a civil action, the plaintiff must prove "the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]." (Bertero v. National General Corp, 13 Cal.3d 43, 50.) (See also, Tool Research & Engineering Corp. v. Henigson, 46 Cal.App.3d 675, 682; Weaver v. Superior Court, 95 Cal.App.3d 166, 183-184.)

> "Probable cause is synonymous with reasonable cause. One who commences a civil suit acts upon probable cause if he has an honest belief . . . that grounds exist for the proceeding. [Citation.] Probable cause has been defined as 'a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.' [Citation.] And, where the circumstances are such as to satisfy a reasonable man that there is no basis for suit, probable cause is lacking. (Metzenbaum v. Metzenbaum, 121 Cal.App.2d 64, 68 . . . .)" (Masterson v. Pig'n Whistle Corp., 161 Cal.App.2d 323, 335.)

The relevancy of the challenged exhibits relating to the original action in case No. 8598 is clear. First, it is noted Angels asserted as a first affirm-

ative defense to the malicious prosecution action "[p]robable cause existed for instituting civil action number N14705 because [Renn] actually bought [Angels'] attorneys in case numnber N8598." The procedural background discussion part of this opinion demonstrates Angels exhausted every conceivable avenue available to them in their attempt to set aside the stipulated judgment in case No. 8598 upon the ground asserted in the first affirmative defense. Case No. 14705 was filed by Angels in pro per to set aside the judgment in case No. 8598 on grounds of extrinsic fraud. Angels failed in that attmempt to set aside the judgment as well because the grounds asserted for setting aside the judgment in the previous proceeding had been rejected by the trial court and affirmed by this court on appeal. Thus, the proceedings | connected with case No. 8598 were relevant to 10
show Angels acted without probable cause when they filed case No. N14705.

Angels claim there is no evidence in the record regarding the merits of the pleadings and related documents prepared by Angels or their attorneys in case Nos. 8598 and N14705. This claim belies Angels'

confusion as to what probable cause means in the context of a malicious prosecution action. Whether the cases had merit is not the issue --the issue is whether in filing case No. N14705 (not case No. 8598) Angels had a reasonable cause to believe there was a legitimate basis for bringing the suit. An expert witness, Attorney Bruce A. Spear, testified for Renn upon the legal effect of the pleadings, documents and judgments involved in the prior litigations instituted by Angels.[2]

Angels also assert prejudice resulted because the court refused a requested instruction on probable cause. The instruction as requested provides:

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[2]Angels contend numerous exhibits introduced by Renn pertained to Loretta Angel only and not to Thomas Angel because he "was not legally a party to such exhibits." Angels claim the trial court erred by not giving the jury a limiting instruction these exhibits pertained to Loretta Angel only. "In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion." (Downing v. Barett Mobile Home Transport, Inc., 38 Cal.App.3d 519, 523.) Assuming Angels are correct in their assertion a limiting instruction was warranted, they have no basis for claiming error since they failed to request a limiting instruction.

> "If you find that the defendant, in good faith, sought the advice of an attorney before initiating the prosecution of the civil proceeding against plaintiff and made a full, fair and complete disclosure to him of all the pertinent and material facts of which the defendant had knowledge tending to prove or disprove the civil allegations and thereafter the defendant acted upon the advice of the attorney and in the belief of plaintiff's civil liability for the alleged wrong, then you must find that there was probable cause in initiating the prosecution of the civil proceeding against plaintiff." (BAJI No. 7.36)

We conclude the instruction was properly refused because there were no facts to warrant the instruction. There was no evidence in the record that Angels initiated the lawsuit in case No. N14705 upon the advice of counsel. The fact Angels pursued their legal remedies as far as possible in the original lawsuit, case No. 8598, with and upon the advice of counsel was irrelevant to the issue whether Angels had probable cause to file case No. N14705. A reasonable or good faith belief, based upon advice of counsel in bringing the action in case No. 8598 cannot be bootstrapped to show the existence of probable cause in bringing the action in case No. N14705.

There was sufficient evidence in this case to support the implied finding the lawsuit in case No. N14705 was initiated by | Angels without probable 12

cause. Evidence supporting the jury's implied finding of lack of probable cause in the general verdict rendered in favor of Renn includes the deposition testimony of Angels taken in connection with the instant malicious prosecution action as well as the multitude of documents filed by Angels in the multiple court proceedings initiated by them against Renn. In their depositions, the Angels were unable to cite any evidence supporting their claim Renn had bought-off or bribed their attorney. Angels asserted this claim was the basis for filing the lawsuit in case No. N14705.

Finally, there is sufficient evidence of malice. Malice may be "inferred from the factual predicate underlying the determination of a lack of probable cause. (Singleton v. Singleton, 68 Cal.App.2d 681, 696 . . . .)" (Weaver v. Superior Court, supra, 95 Cal.App.3d 166, 192-193.) Proof of malice in the form of actually demonstrated ill will or bad faith is not required. (Id., at p. 188; see also Griswold v. Griswold, 143 Cal. 617; Albertson v. Raboff, 46 Cal.2d 375.) "What is required is evidence which establishes bad faith, or the absence of an honest and

sincere belief that the prosecution was justified by the existent facts and circumstances [citation]." (Singleton v. Singleton, 68 Cal.App.2d 681, 696.) Although malice is not to be necessarily inferred from want of probable cause, the jury may nevertheless make such an inference. 13 Under the facts of the instant case, the jury could have properly inferred malice from the finding there was no probable cause for instituting case No. N14705.

Since we conclude there is sufficient evidence to support the cause of action for malicious prosecution, we need not and do not address Angels' contention there is no evidence Renn suffered severe emotional distress as a consequence of being sued by Angels in case No. N14705. Where several counts or issues are tried, a general verdict will not be disturbed by an appellate court if a single one of such counts or issues is supported by substantial evidence. (See, Henerson v. Harnischfeger Corp., 12 Cal.3d 663, 673.)

III

Punitive Damages

Angels contend the award of punitive damages must

be reversed because evidence of their wealth or financial condition was not introduced. Angels further contend the award of punitive damages is excessive in that the amount awarded does not reasonably relate to the amount of compensatory damages. These contentions are without support in the law and are, therefore, without merit.

All "presumptions are in favor of the correctness of the verdict and judgment. After an award has been
14 approved by the | trial court, an appellate court will not set aside the award as excessive unless a consideration of the entire record, including the evidence, is convincing that the award was the result of passion or prejudice." (Fletcher v. Western National Life Ins. Co., 10 Cal.App.3d 376, 408.) (See also, Neal v. Farmers Ins. Exchange, 21 Cal.3d 910, 927-929.) Recently, the Court of Appeal in Vossler v. Richards Manufacturing Co., 143 Cal.App.3d 952, confronted the precise issue presented in the instant case: whether evidence of the wrongdoer's wealth is necessary to sustain an award of punitive damages. In a well-reasoned opinion, the court concluded the weight of authority was to the contrary.

> "We recognize that since the purpose of punitive damages is to punish and deter wrongdoing by fashioning a monetary penalty tailored to the wealth of the defendant and to the reprehensibility of his conduct, absence of any evidence about the defendant's wealth significantly impairs a rational effectuation of this purpose. However, in view of direct California authority for the principle that the plaintiff need not introduce evidence of the defendant's wealth in order to be awarded punitive damages [citations], it is consonant with stare decisis and consistent with the modern trend to require the wrongdoer to demonstrate at the trial level that a particular award of punitive damages will exact too great a penalty because of his financial condition. Presumably, in the great majority of cases it will be to the plaintiff's advantage to show that the defendant is capable of absorbing a substantial penalty, and in those situations | where it is otherwise, the defendant will be motivated to show its penury. The defendant is in the best position to provide the most accurate data concerning its financial condition, and need not decide whether to introduce such information until after the plaintiff has presented a sufficient case for punitive damages issue to go to the trier of fact." (Vossler, supra, at p. 964.)

An award of punitive damages is left to the sound discretion of the jury. The award must not be the product of prejudice or passion and it should bear a reasonable relation to the actual damages, but there is no requirement of a fixed ratio between the two awards. (See Neal, supra; Fletcher, supra; Vosler, supra.) We are unable to conclude upon review of the record before us that the punitive damages award in

the amount of $100,000 is excessive as a matter of law.

Closing argument by Mrs. Angel exemplifies the reprehensibility of Angels' conduct in initiating the lawsuit against Renn in case No. N14705. The theme of her argument to the jury was the injustices practiced by attorneys upon their clients. She also told the jury she has "not wanted to spend the last 8 years in litigation. My husband stating from the stand that Mr. Renn had become sort of a by product [sic] of the lawsuit, is a statement that I made originally. And the reason I say that is it appears that ever since we got into the unauthorized settlement, we have been fighting the courts. Mr. Renn, I grant you is effected [sic]. But then I think he's responsible, too." |

Finally, Angels contend evidence of the checks Renn issued to his attorney in connection with legal services rendered by counsel in defending the action in case No. N14705 was improperly admitted. The evidence was, contrary to Angels' assertion, properly admitted as evidence relevant to the issue of actual damages.

IV

Excluded Evidence

Angels contend the court improperly excluded certain evidence Angels sought to introduce at trial. The exhibits were designated defendant's A and B, MM through QQ and SS. Angels claim the court's ruling excluding these exhibits from evidence was violative of the parties' pretrial stipulation for judicial notice of documents relating to case Nos. 8598 and N14705.

Many of these exhibits related to litigations between the Angels and third parties. Clearly, these exhibits were properly excluded as irrelevant to any issue in the present case for malicious prosecution. Furthermore, the documents were not part of the multitude of documents to which the pretrial stipulation for judicial notice related.

Angels argue defendant's exhibits J, K, T, V, W and Y were also improperly excluded. Exhibit Y was a copy of the order in Case No. N14705 denying Renn's motion for an order requiring | Angels to post security. Angels offered the exhibit as evidence they filed the lawsuit in good faith. The court ruled the 17

exhibit was irrelevant and explained to Angels the document did not make any finding on the issue of good faith.

Exhibit J was a notice of lis pendens filed by Angels in 1963. Angels offered the exhibit as evidence Renn engaged in a pattern of fraudulent behavior. The evidence was excluded on grounds it was not relevant to the present proceedings and would cause undue confusion of the issues before the jury.

Exhibit T was a motion for an order compelling answers at deposition and for reasonable compensation. The motion was directed at Angels' former attorney Kevin Midlam. Angels filed the motion after the complaint in case No. N14705 was filed. The court ruled the evidence inadmissible because it was irrelevant to Angels' belief when they filed the lawsuit in case No. N14705. The court correctly explained to Angels their state of mind after they initiated the lawsuit was not in issue.

Exhibit V was a copy of the declaration of Angels' former attorney Peter Mueller. Mueller's law
18 firm originally | represented Angels in case N8598. In that declaration, Mueller stated his belief the

lawsuit in case No. 8598 had merit. The court ruled evidence of the merits of case No. 8598 was irrelevant to the issue whether Angels had probable cause to file the lawsuit in case No. N14705.

Exhibit W (there is no notation in the reporter's transcript of the exhibit being offered or rejected) is the declaration of Angels filed in N14705 in which they declare their inability to obtain valid legal representation against the wrongdoing by their attorneys in case No. 8598, and declare their efforts to secure remedy of the wrongdoing by their attorneys in case N8598 with the State Bar of California was unavailing."

The court has broad discretion to admit or exclude evidence. Its decision to admit or exclude evidence will not be disturbed on appeal unless it appears there has been a manifest abuse of that discretion. Only relevant evidence is admissible at trial. Even relevant evidence may be excluded if, on balance, such evidence would cause undue prejudice or confusion of the issues in the case. (See Evid. Code, §§ 350-353.)

At issue in this case was Angels' state of mind

when they filed the complaint in case No. N14705. The evidence Angels complain was improperly excluded
19 was not relevant to this issue. Even assuming the exhibits were marginally relevant to the issues of the case, we find no manifest abuse of discretion by the court in excluding them on grounds of undue prejudice and confusion.

V

Instructions

Angels contend the court improperly refused several requested defense instructions. Angels also contend the court gave improper instructions.

Angels first claim they were entitled to the requested instruction patterned after Civil Code section 3517. The instruction as requested provides "No one can take advantage of his own wrong." Angels assert the instruction related to Renn's "fraudulent claim of reliance on the settlement of record in N8598 [sic] . . . which was Angels [sic] fourth affirmative defense." Angels further claim the instruction was "applicable generally to all of Renn['s] conduct as relating to Angels first affirmative defense." The first affirmative defense alleged "probable cause existed for instituting civil action

number N14705 because plaintiff actually bought defendants' attorneys in case number N8598."

An instruction is properly refused if, though abstractly correct as a statement of law, it lacks support in the evidence. (See generally, 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 293, pp. 293-294; LeMons v. Regents of University of California, 21 Cal.3d 869, 875.) The instruction patterned after Civil Code section 3517 was properly refused. Not only did the instruction lack evidentiary support, but evidence of Renn's motive or attitude with respect to case No. 8598 was irrelevant to Angels' motive for filing the complaint against Renn in case No. N14705.

Angels claim their requested instruction on lack of probable cause patterned after Popelka, Allard, McCowan & Jones v. Superior Court, 107 Cal.App.3d 496, 503, footnote 3, was improperly refused. They claim this error was compounded by the instruction on probable cause actually read to the jury. The refused instruction provides: "Probable cause standard in a malicious prosecution action is partly objective, a reasonable man's belief that the claim has

merit, and partly subjective, defendant's belief that the claim had merit." The instruction on probable cause which was read to the jury provides:

> "Lack of probable cause may be shown in either of two ways:
> "1. That defendants did not have an actual good faith belief in the charges made in Case N14705; or
> "2. That a reasonable person of ordinary prudence would not believe the truth of the charges made in Case N14705." 21

The record reflects although Angels' proposed instruction on probable cause was rejected, they joined Renn in the request for the instruction on probable cause which Angels now claim is defective. Assuming the instruction given was an erroneous statement of the law, a party still cannot object when the improper instruction was given at the request of the complaining party. A party cannot cannot complain of the invited error. This rule applies to instructions jointly requested by both parties. (Gherman v. Colburn, 72 Cal.App.3d 544, 567.)

In any event, we have reviewed all the instructions given on probable cause and find they adequately, fairly and fully instructed the jury on probable cause. Even assuming the court improperly refused Angels' requested instruction on probable cause, no

prejudice resulted. (Bertero v. National General Corp., supra, 13 Cal.3d 43, 58-59.)[3]

Angels contend the court improperly refused their requested instruction on fraud and deceit. (BAJI Nos. 12.31, 12.32, 12.35, 12.36, 12.37, 12.50, 12.51 and 12.52.) They contend failure to give these instructions deprived them of the opportunity to have the jury determine the validity of Angels | first 22
affirmative defense that Renn actually bought their attorney in case No. 8598. The instructions were properly refused on grounds they lacked evidentiary support and upon the additional ground the issues posed by the requested instructions were not issues raised at trial. It was already determined in the motion to set aside the judgment in case No. 8598 upon grounds Renn bought Angels' attorney that there was no evidence to substantiate Angels' claim of extrinsic fraud. Angels attempted to assert the same claim in the complaint filed in case No. N14705 but were precluded from doing so by the doctrine of res

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[3]Indeed, each of the instructions given by the court to which Angels take objection on appeal indicate they were jointly requested by both Renn and Angels. Consequently, Angels are precluded from asserting on appeal the instructions were erroneous.

judicata. Against this procedural background, Angels asserted the claim Renn bought their attorney in case No. 8598 as the basis for their first affirmative defense of probable cause. The court instructed the jury:

> "If indeed the Renns had bribed Attorney Kevin Midlam that would constitute extrinsic fraud as a matter of law."

The jury was also instructed:

> "If you find proof that plaintiff did commit the offense charged, then the existance [sic] of probable cause is established and is a complete defense to the plaintiff's action for malicious prosecution."

The jury was further instructed:

> "To constitute probable cause for the filing of the prior lawsuit against the plaintiff [sic] in this case, the evidence must establish that:
>
> "Defendants had a reasonable and good faith belief that the defendants' former attorney, Kevin Midlam[,] was bought by the plaintiff.
>
> "If you find from all the evidence that the foregoing facts are true, you must find that there was probable cause for the civil lawsuit.
>
> "If you find that such facts are not true, you must find that there was not probable cause for the civil lawsuit."

We find the jury was properly instructed on Angels' theory of defense. Angels were not denied an opportunity to present or argue their first affirma-

tive defense.

Angels also claim the court should have given their requested instruction "Probable cause does not mean 'legal cause' because, if it did, then every plaintiff who failed to recover in his lawsuit would be liable to an action for malicious prosecution." (See Albertson v. Raboff, supra, 185 Cal.App.2d 372, 385.)

They contend the error was compounded by the instruction "A layman who insists upon representing himself must expect and receive the same treatment as if represented by an attorney -- no different, no better, no worse. A litigant who appears in propria persona may not attempt to capitilize [sic] upon his own ignorance or appearance of ignorance." Angels claim the jury inferred from this latter instruction they "were held to the standard of an attorney as to the issue of probable | cause." Angels claim this 24
inference was reinforced by the court's refusal to instruct probable cause is not the equivalent of legal cause.

Angels' argument the jury must have inferred Angels' conduct in filing the action in case No.

N14705 was to be judged according to the "reasonable attorney" standard is without merit. The jury was never instructed on the applicable standard for determining whether an attorney had probable cause for filing a lawsuit on behalf of his client. Consequently, it is too speculative for us to accept as tenable Angels' claim the jury made this leap because it was instructed on litigants appearing in propria persona.

Angels' requested instruction on probable cause taken from Albertson v. Raboff, supra, 185 Cal.App.2d 372, 385, was properly refused. The language of the refused instruction was lifted from the portion of the Albertson opinion discussing reliance on advice of counsel in good faith as a defense to an action for malicious prosecution because that defense shows probable cause. Thus the language from Albertson, relied on by Angels in formulating the requested instruction on probable cause, was taken out of context and taken from a case based on facts entirely different from those at bench. Witkin observes:

> "Correct statements of law are obtainable from opinions of the reviewing courts, and these are necessarily the principal source of instructions. Many are taken verbatim from such opinions. But

an extract may be | inappropriate if the facts underlying the opinion are different from those presented in the new case." (7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 250, p. 255; see generally, cases cited therein.) 25

Angels complain at length the court subjected them to "repeated and excessive abuses" during the trial below. In our view, the court is to be commended for its tremendous patience as well as for its efforts to supervise a trial which often tended to veer off course at Angels' hands. The court bent over backwards to accommodate Angels in defending in propria persona the lawsuit against them while accommodating Renn's right to a fair trial unobstructed by irrelevant and/or confusing issues.[4]

The judgment is affirmed.

STANIFORTH, ACTING P.J.

WE CONCUR:

WORK, J. and BUTLER, J.

[4]Renn contends Angels should be sanctioned for a frivolous appeal in this case. Renn asserts the appeal has failed to raise any issues of colorable merit. At this juncture, we are reluctant to conclude this appeal is frivolous even though after some discussion we concluded none of their contentions has merit. Although none of the issues raised has any merit, the trial transcript as well as Angels' appellants' brief suggest Angels had no true grasp or idea of evidentiary or procedural rule or the issues in the instant case. These facts offer possible explanation for the absence of merit of the issues raised on appeal. Renn's request for sanctions is therefore denied.

F I L E D
Robert D. Zumwalt, Clerk

M A Y 2 9 1984
By L. TUSA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY JUDICIAL DISTRICT

LOUIS H. RENN, Plaintiff, v. THOMAS R. ANGEL, LORETTA C. ANGEL and DOES I through X, Inclusive. Defendants.	CASE NO. N 23298 ORDER DENYING JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND STAY OF EXECUTION

The Motion of Defendants, Thomas R. Angel and Loretta C. Angel for an Order for Judgment Notstanding the Verdict, New Trial, and Stay of Execution came on regularly for hearing by the court on May 17, 1984.

Plaintiff appeared by counsel Clark & Burkhardt by Philip Burkhardt; Defendants appeared in propria persona.

On proof being made to the satisfaction of the court that each of said Motions ought to be denied,

IT IS ORDERED that the Motion for Judgment Notwithstanding the Verdict be, and it hereby is, denied on the grounbds that the verdict is sustained by sufficient or substantial evidence.

IT IS FURTHER ORDERED that the Motion for a New Trial be, and hereby is, denied.

IT IS FURTHER ORDERED that Defendants' Motion for Stay of Execution of Judgment be, and hereby is, denied.

DATED: May 29, 1984

Signed /s/ by Don Martinson

DON MARTINSON
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

LOUIS H. RENN, Plaintiff vs. THOMAS R. ANGEL AND LORETTA C. ANGEL, Defendants	F I L E D Robert D. Zumwalt, Clerk MAR 9 1984 Judgment on Verdict In Open Court C.C.P. Sec. 664 No. N 23298

This action came on regularly for trial on the 27TH day of FEBRUARY, 1984. The said parties appeared by their attorneys, PHILIP BURKHARDT, counsel for Plaintiff and THE DEFENDANTS APPEAR IN PROPRIA PERSONA. A jury of TWELVE persons was regularly empaneled and sworn to try said action. Witnesses on the part of Plaintiff and Defendants were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider its verdict: subsequently, all of the jurors returned into court with the verdict signed by the foreman, and duly rendered their verdict in writing in favor of the PLAINTIFF, as follows:

"WE, THE JURY, IN THE ABOVE ENTITLED ACTION FIND IN FAVOR OF THE PLAINTIFF, LOUIS H. RENN AND AGAINST THE DEFENDANTS, THOMAS R. ANGEL AND LORETTA C. ANGEL AND FIX DAMAGES AS FOLLOWS:

SPECIAL DAMAGES	$ 4,331.13
GENERAL DAMAGES	$ 50,000.00
PUNITIVE DAMAGES	$ 100,000.00

DATED: MARCH 9, 1984
14:15 P.M.

JURY FOREMAN

BY /S/ JAMES T. SLOCUM

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said PLAINTIFF, LOUIS H. RENN, have and recover from said DEFENDANTS, THOMAS R. ANGEL AND LORETTA C. ANGEL, JUDGMENT IN THE AMOUNT OF $154,331.13 AND costs and disbursements incurred in this action, amounting to the sum of $ _____.

I, the undersigned, Clerk of the Superior Court of San Diego County, do hereby certify the foregoing to be a full, true and correct Judgment entered in the above entitled action.

ATTEST my hand and the seal of said Superior Court, this 9TH day of MARCH, 1984.

ROBERT D. ZUMWALT, Clerk

By /S/ Lillian M. Tusa,

LILLIAN M. TUSA, Deputy Clerk

E N T E R E D

MAR 12 1984

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